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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1252

DONALD L. WAMP, CARL L. GIBSON, SHERMAN L. PAUL and MOCCASIN BEND ASSOCIATION,
Petitioners,

vs.

CHATTANOOGA HOUSING AUTHORITY, CITY OF CHATTANOOGA, TENNESSEE, CAMERON-OXFORD ASSOCIATES, ADVANCE MORTGAGE CORPORATION, MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., THE UNITED STATES OF AMERICA EX REL. THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also EX REL. THE FEDERAL HOUSING ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD P. JAHN
TANNER & JAHN
1223 Volunteer Building
Chattanooga, Tennessee 37402
615-756-8473
Counsel for Petitioners

March 3, 1976

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Donald L. Wamp, Carl L. Gibson, Sherman L. Paul and Moccasin Bend Association, a Tennessee nonprofit corporation, pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Sixth Circuit, rendered in

these proceedings on December 5, 1975, which affirmed the dismissal of petitioners' suit by the United States District Court for the Eastern District of Tennessee, on the ground that petitioners had no standing to sue.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee is reported at 384 F. Supp. 251 and is set forth at pages A1-A12 hereinafter. The opinion of the United States Court of Appeals for the Sixth Circuit is not reported and is set forth at pages A15-A19 hereinafter.

JURISDICTION

The decision rendered by the United States Court of Appeals for the Sixth Circuit was filed December 5, 1975. This petition for certiorari was filed less than 90 days after that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners sought to enjoin the construction of a federally subsidized apartment complex upon Cameron Hill, a substantial local landmark within an urban renewal project immediately adjacent to downtown Chattanooga, Tennessee. They further sought cancellation of the deeds and contracts between the developer and the government agencies involved, and the compelling of a reevaluation, resolicitation and redisposition of the Cameron Hill tract (A1-A2[1]). The lawsuit was filed in

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1. Page references followed by the letter "A" are references to the pages of the joint appendix filed with the United States Court of Appeals for the Sixth Circuit in connection with the appeal to that Court. Page references preceded by the letter "R" are references to the original record. Page references preceded by

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the Tennessee State Chancery Court (5A) and removed by the respondents to the Federal District Court at Chattanooga (2A, 24A, A2).

A public bid letting for the project involved had occurred in 1969. After four years of negotiations with the only 1969 bidder, and after repeated downgrading of the contract requirements without resubmission for further public bidding, the original bidder abandoned the project and was dissolved. Without again readvertising the project for open competitive bidding, the local housing authority, over widespread public protest, and demand for such readvertisement, instead in late 1973 issued a deed to a stranger first formed only weeks before, which never had to bid competitively against anyone for the public property. The land was sold at far below its value under the reuse plan, for an unneeded local reuse, far beneath the true potential for the site in question.

No Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(C), was ever prepared, nor were public hearings held on the threshold issue of the necessity of an EIS.

Petitioners asserted mismanagement of public funds and property and the letting of an illegal contract by the public authorities. They also asserted that they had sustained special injury not shared in by the public generally since they had been denied the opportunity to speak as to the proper reuse of Cameron Hill and above all the opportunity to bid in free and open competition for the public land, which they desired to do.

(Footnote Continued)

letter "A" are to the subsequent pages of this petition where the opinions of the lower courts are attached as appendices.

One month after suit was filed, but after removal to the local District Court, petitioners sought to amend to raise the specific question of whether an EIS under NEPA was, in any event, a prerequisite for conveying the public land for the use intended.

Both lower courts found that petitioner lacked standing to bring the initial suit in the Chancery Court of Hamilton County, Tennessee, at Chattanooga, and that accordingly, removal jurisdiction did not exist in the Federal District Court, hence the action was to be dismissed. The District Court held that the requested NEPA issue amendment could not be considered on the standing to sue question, holding that it would be improper to allow the amendment if no standing to sue existed under the complaint when the cause was removed (A12).

The questions thereby presented are the following:

1. Did petitioners have standing to sue?

   A. Were the controlling Tennessee decisions erroneously applied by the lower Federal Courts?

   B. If not, do the recent decisions of the United States Supreme Court governing the standing of a citizen to sue nonetheless control, where federal rights are asserted in a state court proceeding?

   C. If so, did petitioners show sufficient injury in fact to themselves to meet federal standing to sue requirements?

   D. Should the NEPA issue which petitioners sought to raise by a timely amendment have been considered a part of their original complaint when evaluating their standing to sue?

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2. Was the deed to Cameron Hill from the Chattanooga Housing Authority to Cameron-Oxford Associates void by reason of the failure of the Chattanooga Housing Authority to resubmit the project for public bidding, where both the Federal Housing Act, and the Tennessee Housing Authority Act, adopted pursuant to the Federal Act, required the Chattanooga Housing Authority to give "maximum opportunity, consistent with the sound needs of the locality as a whole, for the redevelopment of the urban renewal area by private enterprise"?

STATUTES INVOLVED

The Federal Housing Act provides in part as follows (42 U.S.C. § 1455):

§ 1455. Requirements for loan- or capital-grant contracts

Approval of urban renewal plan

Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) *the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole for the rehabilitation or redevelopment of the urban renewal area by private enterprise;* (iii) the urban

renewal plan conforms to a general plan for the development of the locality as a whole; and (iv) the urban renewal plan gives due consideration to the provision of adequate park and recreational areas and facilities, as may be desirable for neighborhood improvement, with special consideration for the health, safety, and welfare of children residing in the general vicinity of the site covered by the plan. (Emphasis supplied).

The Tennessee Housing Authority law provides in part as follows (T.C.A. § 13-821):

13-821. Conservation and rehabilitation by private enterprise—Findings.—It is hereby found and declared that (a) there exist in municipalities of the state slum, blighted, and deteriorated areas which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the state, and the findings and declarations made in § 13-813 with respect to slum and blighted areas are hereby affirmed and restated, (b) certain slum, blighted, or deteriorated areas, or portions thereof, may require acquisitions and clearance, as provided in §§ 13-813—13-827, since the prevailing condition of decay may make impracticable the reclamation of the area by conservation or rehabilitation, but other areas or portions thereof may, through the means provided in §§ 13-813—13-827, be susceptible of conservation or rehabilitation in such a manner that the conditions and evils hereinbefore enumerated may be eliminated, remedied or prevented, and to the extent feasible, salvable slum and blighted areas should be conserved and rehabilitated through voluntary action and the regulatory process, and (c) all powers conferred

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by §§ 13-813—13-827, are for public uses and purposes for which public money may be expended and such other powers exercised, and the necessity in the public interest for the provisions of §§ 13-813—13-827, is hereby declared as a matter of legislative determination. *A municipality, to the greatest extent it determines to be feasible in carrying out the provisions of §§ 13-813—13-827, shall afford maximum opportunity, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment of areas by private enterprise.* (Emphasis supplied) [Acts 1955, ch. 181, § 1.]

STATEMENT OF FACTS

In 1957 an urban renewal program was adopted in Chattanooga involving several hundred acres of land immediately west of downtown Chattanooga, said project being known as the "Golden Gateway Urban Renewal Program" (R 3-5, 447). Included within the project was Cameron Hill, a 55 acre tract lying immediately west of downtown Chattanooga (R 5, 448). It represented the largest undeveloped tract of land in the immediate downtown vicinity and its total area is to be contrasted with the approximately 70 acres in Chattanooga's central business district (Exhibits 10, 10A, 18 and 22).

Cameron Hill was a major historic landmark in the Civil War history of the area (R 123, 316, 374, Ex. 31, 396-397, 402, 405-406) and Boynton Park on its top commemorated this history, all as shown by various monuments and historical markers on the hill (R 123, Ex. 19). The City of Chattanooga held title to Boynton Park (R 10, 15).

As part of said renewal plan, Cameron Hill was lowered some 125 feet, thereby providing a major source of fill dirt for other public needs and creating approximately 22 acres of flat usable land on the lowered top of the hill (R 78, 55; 79A). In the process, Boynton Park was destroyed.

Both the original applicable reuse plan in 1958 (R 88, Ex. 34) as well as an amendment to same in 1968 (R 82, 88, 449-451, Ex. 36, Ex. 6) contemplated that Cameron Hill, after lowering, would be used in part for residential purposes, with up to seven acres of the useable 22 acres available for commercial development (R 20-21, 23-26).

In 1969 the respondent Chattanooga Housing Authority ("CHA") advertised for proposals for the development of the entire Cameron Hill tract, consistent with the reuse plan (Ex. 37). This was the largest and most complex project in the urban renewal area (R 50). At that time Cameron Hill was within the Chattanooga Fire Zone, requiring substantially more expensive fireproof construction than outside the zone (R 281-283, 464-466). The invitation to bid required the developer to include the dedication of a public park in his proposal, but left the size and location of the park to the developer (R 11-12, Ex. 37). The invitation to bid made no mention that proposals would be acceptable conditioned upon the developer being able thereafter to obtain financing for the proposed project.

The only bid submitted was that of Future Chattanooga Development Corporation ("Future") (R 36, 454), which proposed to build a 600-unit apartment complex estimated to cost $12,000,000.00 to $15,000,000.00 (R 36-39), with an offer of $345,000.00 for the public land (See CHA minutes for October 16, 1969, Exhibit 11). Future's proposal, however, was actually non-

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responsive to CHA's advertised request for bids, since it was expressly conditioned upon Future being able to obtain the necessary financing for the proposed project, which it had yet to achieve (R 42-43). This had not been the practice on other bid lettings (R 290).

In 1970 Cameron Hill was excluded from the fire zone by Chattanooga City Ordinance 17-51, thus permitting substantially cheaper construction (about 20%) than was permitted at the time of the 1969 bidding (R 282-283, 464-466).

Future was never able to obtain the financing for its ambitious project. CHA, however, did not resubmit the Cameron Hill site for further bidding but instead permitted Future to repeatedly downgrade its original proposal, always subject to the obtaining of financing. Finally, Future proposed to CHA at its meeting of May 12, 1972 (Exhibit 11) that Broadmoor Shopping Centers, Inc. ("Broadmoor") be allowed to join Future in the Cameron Hill Project, with same thereafter to be a joint venture between these two corporations (R 457). CHA did not object and again made no effort to resubmit the matter for public bidding. The joint venture submitted a revised proposal to CHA at said meeting which eliminated from the proposal the purchase and development of "that part of the original complex fronting on Ninth Street with a value of $120,000.00." On June 9, 1972, a contract was entered into between CHA on the one hand and Future and Broadmoor on the other (as approved at said meeting of May 12, 1972), providing for the purchase of the remaining bulk of the Cameron Hill realty by the venture for $220,000.00 and the development in phases of a residential housing complex on said realty (Ex. 9). This development had been announced at said meeting of May 12, 1972, as a $5.5 million com-

plex with 396 apartment units (Exs. 11 and 39). Said contract expressly provided, however, that the obligations of Future and Broadmoor were subject to their being able to obtain the necessary financing (R 43-44).

This is the only contract that ever resulted from the bid letting in the fall of 1969 (R 39-40, 45, 103). It is to be noted that the construction proposed under said contract was to be at a cost of approximately one-third of that publicly announced by Future shortly after it made its original proposal (Exs. 7 and 11). Further, without resubmitting the project for further competitive bidding due to the changed conditions, CHA allowed the joint venturers to avoid purchasing and developing over one-third of the tract in terms of value (Ninth Street frontage) and also to take advantage of the removal of the site from the Chattanooga Fire Zone (R 284). As a result, wood frame construction for low rise units was now proposed under said contract instead of the original fireproof high rise units. Said wood frame construction was in compliance, however, with minimum FHA standards (R 435-437).

Thereafter, further modification in design and quality occurred, and the passing months again turned into further years while the joint adventurers sought to design a feasible project of their liking which they would be able to finance, with repeated extensions of time to act being given them by CHA (R 46-48, 482).

At the meeting of CHA of November 21, 1973 (Ex. 11), it was announced that Future was being dissolved, and was withdrawing from the project (R 65, 460-461), and that a limited partnership was being organized which would carry on with the Cameron Hill project, with Oxford Development Corporation ("Ox-

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ford") as its sole general partner. The consent of CHA was given at said meeting to this new arrangement and to the conveyance of Cameron Hill to the proposed limited partnership.

On November 29, 1973, an Indiana limited partnership was formed, known as Cameron-Oxford Associates ("Cameron"), whose certificate was recorded in Hamilton County, Tennessee, on December 12, 1973 (Ex. 47). Said certificate described the Cameron Hill realty as its place of business and showed that the general partner was Oxford, with a five percent interest, with Lyle A. Rosenzweig, Trustee, of Indianapolis, Indiana, being the limited partner, with a ninety-five percent interest, in exchange for $100.00 contributed to the partnership.

Cameron was never in a contractual relationship with CHA relative to the development of Cameron Hill prior to December 19, 1973. On that date, however, CHA nonetheless executed a special warranty deed to Cameron, conveying a portion of the Cameron Hill realty, including approximately 16 acres of the flat 22 acres on top, for the sum of $157,500.00 (Ex. 45; R 102, 489). CHA did this pursuant to its June 9, 1972 contract with Future and Broadmoor to which Cameron was not a party (R 103). The deed required construction by the Grantee of the apartment project as ultimately proposed by Future and Broadmoor to CHA.

It is the intention of CHA and Cameron that the remainder of Cameron Hill be later conveyed to Cameron for similar housing development at a similar per acre price as otherwise called for by said contract of June 9, 1972, to which Cameron was not a party (Ex. 9). Public disclosure of the principal members and investors in Cameron as required by law was never made (76A-77A; R 63, 64-67, 68).

Thus, more than four years elapsed from the opening of the original conditional bid for the development of Cameron Hill until a deed to a portion of same occurred with a required reuse calling for the construction of 380 low rise wood frame dwelling units, instead of the 600 fireproof high rise units originally proposed by Future (Exs. 7 and 23). No further invitation for public bidding occurred after the original bid opening in 1969 (R 49).

Under the procedures adopted by CHA and HUD, these organizations are essentially passive and merely receive reuse proposals instead of affirmatively initiating same (R 213-214). No redevelopment or reuse proposal can be accepted until both entities have approved same, however (R 427), and these entities on occasion require proposal modification before such approval will be granted, as in the present case (R 213-214).

Cameron proposed as the public park to be dedicated as part of the project a six acre tract located where the public road enters the hilltop. Only approximately one and one-half acres of this six acres is on the flat surface on top of the hill with the remainder being on the steep hillsides (R 16, 18). The public road bisects this smaller usable area into two small tracts each less than an acre in size (Ex. 4).

This park bears no resemblance in utility, purpose, or usable size to the original Boynton Park and was obviously intended by Cameron to serve as a tastefully landscaped gateway, built and maintained at public expense, to Cameron's housing project (R 119, 138-139).

The project is being financed by a $4,210,600.00 construction loan from respondent Advance Mortgage Corporation, a Delaware corporation ("Advance") secured by a deed of trust (Exhibit 46) to the realty

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from Cameron to respondent Milligan-Reynolds Guaranty Title Agency, Inc., Trustee ("Milligan-Reynolds"). Advance, in turn, has obtained FHA mortgage insurance (R 159-161, 164, 235, 425) under Title 220 of the Federal Housing Act (R 42, 47), which is concerned with providing replacement housing in Urban Renewal areas (R 30). The FHA commitment for Cameron was made in December, 1973 (R 103, 471-473).

At the time the subject suit was filed on February 13, 1974, no construction had started on Cameron Hill (R 103), despite a provision in said deed of December 19, 1973 (Ex. 45) requiring that same start within 30 days of the date of the deed. Construction thereafter began. Cameron has elected to proceed despite the institution of the present action before construction started, and its full awareness of the contentions of the Petitioners.

The price which CHA permitted Cameron to pay in 1973 for the realty in question was based on 1969 appraisals (R 187; Exs. 15 and 16) which did not seek to appraise the fair market value of the property as such, but instead sought to determine the price which the developer should pay for the land, as determined by the economics of the proposed reuse of the land by the developer (R 82-87). Thus, once project construction costs and the approved rental rates were known, after due allowance for a profit for the developer, original land cost was a variable which was adjusted downward to make the developer's proposal economically feasible, regardless of the actual value of the land. No appraisal of land value based upon *all* the available uses for the property under the 1968 reuse plan was ever obtained (R 85-87). Land values have increased substantially in the Chattanooga area since 1969 and particularly land of the type available on

Cameron Hill. On any reasonable basis the land was worth far in excess of the sale price (R 121-123, 309-313, 360-361). HUD agreed that private developers were typically paying $1,000 per unit for non-public raw land (R 185) whereas Cameron was paying about $600, or $10,000 per usable acre (R 183-184); that development costs were the same in either case (R 186); and that no subsidy was supposed to be involved (R 187).

The market for the type housing units involved at the rentals proposed has been fully met in the past by private developers in the Chattanooga area on land other than public land (R 48-49). There has been a proliferation of this type of housing in the Chattanooga area since 1969 (R 163). There is no shortage of this housing at the present time in the Chattanooga area at these rentals and none projected (R 319-320). HUD agreed that private developers have met Chattanooga's need for this type housing (R 424-425).

Other than the public advertisement in 1969 seeking proposals for the development of Cameron Hill, however, no other public notice of meetings dealing with Cameron Hill and its developers was given in advance of such meetings by CHA and/or the City (R 61-62). The Chattanooga Chapter of the American Institute of Architects became aware in November of 1973 that Future was withdrawing from the project and that CHA proposed to go ahead with the project by dealing with Cameron. At this point a committee of three local architects, including petitioner Wamp, was appointed by said Chattanooga Chapter of the AIA to investigate what was happening.

On December 7, 1973, said Chattanooga Chapter of the AIA officially protested by letter to CHA "the

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proposed medium density ordinary FHA housing development plan for Cameron Hill" (Ex. 23, R 297-298). This letter with the reasons for the protest is set out in full in the complaint (15A-16A) and was Exhibit 23 at the trial. As shown by said exhibit, it was felt "the present proposal degrades this magnificent site and . . . will prohibit proper future use". CHA was asked "to stop this present proposed development." It pointed out that the original proposed developers had withdrawn, and that the project approved by CHA and awarded to Cameron was done "with no competition or public notice". It pointed out the changes in Chattanooga since the last reuse study, and stated "we are confident the site can now be utilized for a much higher finer function if the business and design community is given an opportunity to compete on the basis of changed criteria." The letter concluded by pledging the full resources of the Chattanooga Chapter of the AIA to create a fitting development for Cameron Hill.

HUD was also aware of the stand of the local architects (R 345) which the record indicates was a unanimous opinion (R 297, 307, 326), before the deed to Cameron.

NEPA (42 U.S.C. § 4321 et seq.) became effective January 1, 1970. As set forth above, at that time, there was no contract whatsoever between CHA and Future, or any other developer with respect to Cameron Hill. There was no approval of any proposal by CHA or HUD and no FHA mortgage loan insurance commitment of any sort. A HUD capital grant of $9,105,755.00 to CHA constituted the principal funds used to finance the Renewal Project, although $3,472,234.00 in city funds were also used (Ex. 13). Approximately $1,250,000 of public funds was spent readying Cameron Hill for reuse proposals (R 77-78). HUD's approval of the de-

tails of the transaction between CHA and Cameron was not finally obtained until immediately before deed delivery on December 19, 1973 (R 477-478; Ex. 44; Ex. 11).

Before HUD gave its approval to the proposed housing development a "Special Environmental Clearance Form" (HUD form ECO-4) was prepared and filed by HUD on May 25, 1973, as to the subject project and "cleared" on July 2, 1973 (R 152-154; 249; Ex. 21). CHA did not participate in its preparation (R 73). This form specifically found that an EIS was not required for the proposed Cameron Hill project (R 155). Accordingly, HUD has found that "major federal action significantly affecting the quality of the human environment" under NEPA (42 U.S.C. § 4332(2)(C)) was not involved in the Cameron Hill project.

Review of said form ECO-4 shows on its face that many of the inquiries made by the form were ignored; that only the briefest and most cursory answers were given in most instances; and that repeatedly mere conclusions without explanations or supporting facts which could be reviewed are given.

Original suit was filed February 13, 1974 (24A), before ground was broken for the project (13A, R 103). On March 13, 1974, after removal to the Federal Court, Petitioners sought to amend to allege violations of the National Environmental Policy Act ("NEPA") (39A-42A).

On April 11, 1974, without acting upon said motion to amend, the District Judge set a special hearing to begin April 29, 1974, to hear evidence and argument on whether Defendants were required to file an Environmental Impact Statement ("EIS") under NEPA (43A). Three days of hearings were held (A2). Hav-

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ing concluded that initial removal jurisdiction did not exist because of the finding of lack of standing to sue in the State Court (A8, A12), the District Judge held that attempted amendments to the pleadings, subsequent to removal, to raise the NEPA issues, cannot serve to confer Federal Court jurisdiction if none in fact existed as of the time of removal (A3). Thus the Court deemed it "unnecessary and inappropriate" to act upon said motion to amend (A12), and did not do so, nor did it consider the NEPA issues raised by said proposed amendments though fully tried at said specially set hearing.

The U. S. Court of Appeals for the Sixth Circuit did not pass on this action by the trial judge though raised in the appeal.

At the District Court NEPA issue hearings, petitioners presented substantial proof that an EIS was a prerequisite under NEPA before a valid deed could be delivered and the proposed project approved. Should resolution of this issue become material the cause should be remanded to the Federal District Judge for appropriate decision.

Plaintiff, Moccasin Bend Association, is a Tennessee nonprofit corporation chartered in 1958 (Ex. 20, R 145), whose members have been active for years in seeking to properly preserve the Moccasin Bend area across the Tennessee River from Cameron Hill (R 141, Ex. 32). This Plaintiff through its members years ago actively resisted the lowering of Cameron Hill and the destruction of Boynton Park, including a lawsuit which in 1962 went to the Tennessee Supreme Court. That Court held they had no standing to sue as to that issue (R 127, 381-382, 79A).

Thereafter, they spent funds (R 124) and worked constantly towards the reestablishment of a suitable

park on Cameron Hill to replace Boynton Park, in keeping with the historical significance of the site (R 104-105, 114-115, 117, 119, 121-122, 124, 376-378, 459).

Members of the Association have vigorously protested the proposed park at CHA meetings and also protested the lack of any opportunity on the part of those interested to "participate in the planning for the area to be set aside for park purposes until, in effect, the plans for the project were an accomplished fact" (CHA's minutes of January 12, 1973, Exhibit 11).

Petitioner Wamp was a past president of the Chattanooga Chapter of the American Institute of Architects with very substantial experience in planning and developing apartment projects. He had been the most active local architect in the overall Golden Gateway Urban Renewal Project of which Cameron Hill was a part. He had been active through the local Chapter of the AIA in studying the plans for Cameron Hill from a professional and civic viewpoint and meeting with the CHA as to problems noted since 1969 (R 291-301). He desired to bid for the property and to develop same in accordance with the reuse plan personally, under open competitive conditions (R 289-290).

Various of the Plaintiffs and members of the Association made repeated prior use of Cameron Hill and particularly Boynton Park on its summit in past years (R 120, 138, 142, 145, 382, 405). They desire to use the park if again properly reestablished (R 128) and some possibly even to move to Cameron Hill (R 142-143). The original complaint charged:

> "26. Plaintiffs are specially injured in that they have been effectively denied a public hearing

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on the issue of the proper use to which Cameron Hill should be put, and/or opportunity to offer proposals for the development of Cameron Hill in free and open competition with any other interested parties, an opportunity they earnestly seek, not only as a matter of right, but also for the betterment of Chattanooga.

"27. As taxpayers, Plaintiffs will also be irreparably injured through the low return of taxes to the community from the presently planned housing project as compared to the much higher tax yield the property should and would generate if properly utilized."

Cameron Hill is a leading site for the future logical expansion of downtown Chattanooga. It is an appropriate site for civic type buildings; park purposes; appropriate commercial buildings; as well as various types of housing, and particularly high rise housing. The present development is probably the least impressive of any that could be undertaken and remain within the scope of the 1968 reuse plan. Cameron Hill has tremendous potential for the Chattanooga downtown area and, therefore, the entire community, if properly and realistically developed with appropriate imagination (R 306, Ex. 23).

REASONS FOR GRANTING THE WRIT

I

Petitioners Did Have the Necessary Standing to Sue

A. The Controlling Tennessee Decisions Were Erroneously Applied by the Lower Federal Courts.

Two Tennessee cases will fully illustrate to the Court the basic Tennessee state law on the standing to

sue issue. They are *Burns* v. *City of Nashville*, 142 Tenn. 541, 221 S.W. 828 (1919); and *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W. 2d 292 (1969).

Badgett cites *Burns* and exhaustively reviews the prior cases and sets forth the general rule in Tennessee as follows (page 294):

> "As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large."

On the same page it also stated the following:

> "However, the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes."

In *Burns* it was recognized that individual citizen-taxpayers can bring suit against public officials for mismanagement and the letting of illegal contracts.

In view of the allegations and proof of misuse of public property, illegality of the contract and deed in question, and mismanagement, petitioners are well within the exception to the Tennessee general rule, even without alleging special injury to themselves.

The distinction made by the District Judge between the misuse or unlawful diversion of public *funds* recognized to be within the exception in *Badgett*, and the misuse of public *property* here involved (A8-A9), is a distinction without a difference. Merely because no Tennessee case involving property as compared to funds could be found (A8-A9), does not mean that there

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is any distinction to be made between the *type* public asset misused or unlawfully diverted, for the loss to the public is equally great in either case.

Under the applicable statutes, regulations and resolutions hereinafter discussed, it was entirely illegal to dispose of Cameron Hill without free and open competitive bidding.

While adhering to the foregoing authorities, the Tennessee Supreme Court in a 1975 decision, *Bennett* v. *Stutts*, 521 S.W. 2d 575 at page 577, recognized the practicalities of persuading public officials, such as the District Attorney General, to act to redress public wrongs such as those alleged in the present case. It stated

> "Public spirited citizens should not be stifled or stopped in their search for solution to public wrongs and official misconduct such as are involved in this case.
>
> * * *
>
> (3) When citizens sue to rectify a public wrong, under these circumstances, a copy of the complaint shall be served upon the District Attorney General. It shall be the duty of the trial court forthwith to conduct an in limine hearing designed to determine whether to permit plaintiffs to proceed. If it be determined that the District Attorney General's refusal to bring the action, or to authorize the use of his name in its institution, was improper or unjustified, or that plaintiff's case is prima facie meritorious, the trial court shall permit the action to proceed."

In the subject case paragraph 3 of the prayers for relief in the original complaint prayed that the Attorney General of Hamilton County, Tennessee "be

notified of the filing of this complaint so that he may intervene to enforce the rights of the general public under these circumstances, should he determine to do so." (23A). The record will reflect that no such intervention occurred and that the trial court failed to hear and consider whether the failure of the Attorney General to act in and of itself gave petitioners standing under Tennessee law as summarized in the *Bennett* decision.

The prior unreported 1962 decision of the Tennessee Supreme Court holding that the Moccasin Bend Association had no standing to resist the lowering of Cameron Hill, and the destruction of Boynton Park on its surface, was referred to by both the District Judge (page A12) and the U.S. Court of Appeals for the Sixth Circuit (page A16) in support of their ruling. As shown by the quote from that decision by the U.S. Court of Appeals for the Sixth Circuit in its opinion (page A17), standing to sue was denied in that case because the injury was general and not special to the then plaintiffs. That is not the present case.

Those of the petitioners who wished to bid and/or be heard (21A) had no greater right to do so than any other member of the public generally. They, however, unlike the vast majority of the public, which had no such direct interest in bidding, and/or being heard in the decision making process, were specially injured when denied the opportunity to bid under the altered conditions and/or to otherwise be heard.

Petitioners accordingly respectfully contend that the lower Federal Courts have failed to correctly apply the controlling Tennessee decisions to this case and have accordingly erroneously decided that petitioners had no standing to sue.

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B. Where Federal Rights Are Asserted in a State Court Proceeding, Federal Decisions Control Standing to Sue.

So far as Petitioners have been able to determine, this issue has not previously been passed upon this court, or any other lower federal court.

Even if standing to sue did not exist under Tennessee state law the recent decisions of this court have revamped and broadened the law as to the standing of a citizen to sue. The narrow general Tennessee rule was formerly Federal law also. While there are earlier and later cases, Petitioners believe the key decision here to be *U. S.* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), (1973) 412 U.S. 669, 37 L. Ed. 2d 254, 93 S. Ct. 2405, which amplified and clarified *Sierra Club* v. *Morton*, (1972) 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361.

In *SCRAP* this court stated (412 U.S. 686-688):

> "Relying upon our prior decisions in Data Processing Service v Camp, 397 US 150, 25 L Ed 2d 184, 90 S Ct 827, and Barlow v Collins, 397 US 159, 25 L Ed 2d 192, 90 S Ct 832, we held that § 702 of the APA conferred standing to obtain judicial review of agency action only upon those who could show 'that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.' 405 US, at 733, 31 L Ed 2d 636."
>
> "In interpreting 'injury in fact' we made it clear that standing was not confined to those who could show 'economic harm,' although both Data

Processing and Barlow had involved that kind of injury. Nor, we said, could the fact that many persons shared the same injury be insufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather, we explained: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' Id., at 734, 31 L Ed 2d 636. Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those [412 US 687] resources suffered the same harm, deprives them of standing.

In Sierra Club, though, we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. No such specific injury was alleged in Sierra Club."

* * *

"Unlike the specific and geographically limited federal action of which the petitioner complained in Sierra Club, the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural re-

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> sources of the country. Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury."
>
> * * *
>
> "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."

When federal questions arise in causes pending in the state courts, the latter are competent to decide them. *Missouri Pac. R. Co.* v. *Fitzgerald,* (Neb. 1896) 16 S. Ct. 389, 160 U.S. 556, 40 L. Ed. 536. The state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts. *Grubb* v. *Public Utilities Commission of Ohio,* (Ohio 1930) 50 S. Ct. 374, 281 U.S. 470, 74 L. Ed. 972. See also *Missouri* v. *Taylor,* (Mo. 1924) 45 S. Ct. 47, 226 U.S. 200, 69 L. Ed. 247.

Apart from the requested amendment charging NEPA violation (39A), the original complaint charged violations of provisions of the Federal Housing Act and also of HUD guidelines which gave rights to Petitioners and which Petitioners were entitled to enforce (18A, 19A, 21A). All state laws and Chattanooga Housing Authority resolutions involved in this case are permeated

with the overriding federal enabling legislation and have a quasi federal tinge. Federal funds which filtered to the local level are also heavily involved.

It is clear that the plaintiffs could bring an action against HUD and the other defendants in State Court pursuant to the Federal Housing Act, 42 U.S.C.A. §§ 1441, et seq., because Congress has not expressly limited jurisdiction under this act to federal courts and therefore concurrent jurisdiction exists. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. Okl. 1942); *Holiday Magic, Inc.* v. *Warren*, 357 F. Supp. 20 (D.C. Wis. 1973).

For examples of cases where citizens' rights under the Federal Housing Act have been dealt with in the state courts see also, *Alaska State Housing Authority* v. *Contento*, (Alaska Sup. Ct. 1967) 432 P. 2d 117; *Town of Brookline* v. *Brookline Development Authority*, (Mass. Sup. Jud. Ct., 1962) 183 N.E. 2d 484; *City of Buffalo* v. *Mollenberg-Betz Machine Co.*, 279 N.Y.S. 2d 842. See also *Green Street Association* v. *Daley*, (C.A. 7, 1967) 373 F. 2d 1.

Just as there is no restriction in the Federal Housing Act preventing a citizen from enforcing his federal rights thereunder in a state court, similarly there is no such restriction in NEPA (42 U.S.C. § 4321, et seq.).

When a state court determines federal questions, its decisions on federal law must conform to the decisions of the United States Supreme Court. *Chesapeake & O. R. Co.* v. *Martin*, 283 U.S. 209; 20 Am. Jur. 2d, *Courts*, § 226 and cases therein cited. Any other rule would be an intolerable interference with the federal right.

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It is accordingly respectfully submitted that the "injury in fact" concepts set forth in *Sierra Club* and *SCRAP* control standing to sue to assert federal rights even if these rights were asserted in a state court proceeding.

C. Petitioners Sustained Sufficient "Injury in Fact" to Meet Federal Standing to Sue Requirements.

Those of petitioners who desired to bid in 1973 suffered "economic harm" when denied that opportunity to make a profit. The statutes directing that "maximum opportunity" be given for development by private enterprise, as well as the law of public contracts generally, were violated when no competitive bidding occurred, resulting in injury to an interest of petitioners "arguably within the zone of interest to be protected or regulated by the statutes that the agencies were claimed to have violated." The additional taxes the individual petitioners will have to pay will also result in economic injury.

Further, petitioners have shown harm to their use and enjoyment of the natural resources of the Chattanooga area by the gross mishandling of the Cameron Hill tract, and particularly the reestablishment of the public park thereon. They have shown a much greater degree of injury, in fact, than the students in *SCRAP* who were found to have standing to sue.

In a footnote the U.S. Court of Appeals for the Sixth Circuit in its opinion stated (page A17):

> "Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973); and *South Hill Neighborhood*

Association v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970)."

The foregoing decisions cannot stand in the face of *Sierra Club* and *SCRAP*, if the foregoing decisions are otherwise deemed to be proper authority denying petitioners the necessary standing to sue under the facts in this case.

D. The NEPA Issue Which Petitioners Sought to Raise by Timely Amendment After Removal of the Cause to the Federal District Court Should Have Been Considered a Part of Their Complaint When Determining Their Standing to Sue.

The U. S. Court of Appeals for the 6th Circuit held that if the state court lacks jurisdiction of the subject matter or of the parties, the Federal Court acquires none when the cause is removed to that court (page A17). The District Judge further held that an attempted amendment to the pleadings subsequent to removal cannot serve to confer Federal Court jurisdiction if none, in fact, existed as of the time of removal (A3).

Assuming that the allegations of the original complaint in the state Chancery Court were insufficient to give petitioners standing to sue, which they dispute, it is clear that the amendment which they sought approximately a month after suit was filed, raising the question of whether NEPA required an EIS before the project could be approved, and a valid deed granted, would unquestionably have been an issue petitioners had standing to raise under the *Sierra Club* and *SCRAP* decisions.

The state court had jurisdiction of this issue. Actually, the complaint as filed was broad enough to raise this issue since denial of the right to participate

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in the decision-making process was specifically alleged, although no reference to NEPA per se was originally made.

Under these circumstances, where the actions of the respondents in removing the cause prevented petitioners from seeking a timely amendment in the state court proceedings, is it proper for the District Judge to dismiss the cause or at the least should he have remanded the cause to the state court, which had the power to allow the amendment, even if the District Judge felt that he did not because of the technicalities of removal jurisdiction? Petitioners respectfully submit that as a matter of proper procedure, under the peculiar circumstances of this case, they should not have been required to refile their law suit, with the NEPA issue included in the new complaint, but instead at the least were entitled to a remand to the state court for allowance of the amendment.

By considering only the status of the pleadings as of the time of removal without reference to the pleadings as they would have been after timely amendment, and deciding the standing to sue issue on the more narrow, rather than the broader viewpoint, petitioners were denied, through no fault of their own, a proper view of their overall position when their standing to sue was being evaluated.

This was particularly ironic since the NEPA issue was fully tried before the District Judge by all parties, even though the amendment had not been allowed.

There was a clear requirement that an EIS under NEPA be prepared for the project in question prior to its authorization but none whatsoever was prepared nor has it been prepared to date. With the acreage, location and the dollar amount of the FHA loan com-

mitment here involved, existing cases quickly demonstrate that an EIS under NEPA was a prerequisite.

Silva v. *Romney* (*Lynn*), 342 F. Supp. 783 (D.C. Mass., April 13, 1972); 473 F. 2d 287 (C.A. 1, Feb. 2, 1973); and 482 F. 2d 1282 (C.A. 1, July 5, 1973) establishes as a matter of law that an EIS under NEPA is a prerequisite to valid HUD action approving a sale to a private developer of land for construction of more than 100 housing units, where a $4,000,000.00 HUD mortgage guarantee was involved—almost exactly the present case. *Silva* also held that the private contractor was in a "federal partnership" with HUD, and that both were properly subject to a preliminary injunction by the District Court pending proper compliance with NEPA.

See also *Goose Hollow Foothills League* v. *Romney*, 334 F. Supp. 877 (1971) and 58 *Iowa Law Review*, 805-890 where as extensive article appears entitled "HUD And The Human Environment; A Preliminary Analysis Of The Impact Of The National Environmental Policy Act of 1969 Upon The Department of Housing And Urban Development," and particularly pages 845 ff.

The major federal action in question involved here occurred after NEPA became effective, hence NEPA had to be complied with. *Environmental Defense Fund* v. *Tennessee Valley Auth.*, 468 F. 2d 1164 (C.A. 6, 1972); *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (D.C. Cir. 1971); see also § 11 of the 1971 CEQ Guideline (17 ALR Fed. 33 at 49-50).

As the lead federal agency, HUD was responsible for complying with NEPA. Prior to making its threshold determination of significance under NEPA, HUD

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must give notice to the public of the proposed major federal action involved and an opportunity to submit relevant facts which might bear upon the agency's threshold determination. *Hanly* v. *Kleindienst,* 471 F. 2d 823 (2d Cir. 1972); *Hanly* v. *Mitchell,* 460 F. 2d 640 (2d Cir. 1972). This obviously was never done in the subject case in violation of plaintiffs' rights (R 226).

HUD acknowledged that major federal action was involved in the present case but felt that there was no significant environmental impact (R 258-259). It acknowledged that an EIS would have been required when Cameron Hill was lowered if NEPA had then been in existence (R 252). It also acknowledged that the HUD office handling the project had prepared only one EIS under NEPA, and this involved a renewal housing project at Greenville, Tennessee almost identical in dollars and acreage with the subject project (R 267-268).

It accordingly appears that there was substantial merit to the NEPA issue which petitioners sought to raise and which they had standing to raise under *Sierra Club* and *SCRAP.* The matter should have been handled procedurally so that the amendment could have been allowed before the standing to sue issue was determined.

II

The Failure to Resubmit the Cameron Hill Project for Public Bidding in 1973 Violated the Federal Housing Act and the Tennessee Housing Authority Act As Well As the General Law on Public Contracts With the Result That the Deed of Cameron Hill to Cameron-Oxford Associates Was Void

Although the District Judge found that Petitioners had no standing to sue, hence he had no jurisdiction,

he nonetheless went into the merits of petitioners' contentions as to illegal acts on the part of the respondents. While finding conduct that was "most inappropriate" (A11); "unusual, if not questionable" (A9), and an illegal failure to make public disclosure of the identity of the principal members of the developer (A10), which latter illegality the District Judge found Plaintiffs had no standing to litigate (A10), the District Judge otherwise held that he "is unable to find any specific instance of illegal conduct on the part of the Chattanooga Housing Authority or any other defendant with regard to" the disposition of Cameron Hill (A9).

The U. S. Court of Appeals for the Sixth Circuit did not deal with the merits of these findings though raised in petitioners' appeal to that Court.

When Congress and the Tennessee Legislature each adopted statutory provisions requiring those responsible for the redevelopment of public land in urban renewal areas "to afford maximum opportunity . . . to the rehabilitation or redevelopment . . . by private enterprise" it must be presumed that the well established general law in the field of public contracts was the standard by which the true meaning of those words was to be established. The following excerpts from the article on "Public Works and Contracts" at 64 Am. Jur. 2d is highly material on the applicable general law.

From Section 58

> "Indeed, it is the duty of the public authorities to reject all bids which do not comply substantially with the terms of the proposal, for any other rule would destroy free competition. A contract entered into on terms more favorable to the contractor than indicated by the advertised plans or

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specifications, or incorporating material changes in and additions to those plans and specifications, is void."

From Section 66

"After bids have been made upon the basis of plans and specifications prepared by public authorities and given out to all interested bidders, no material or substantial change in any of the terms of such plans and specifications will be allowed without a new advertisement giving all bidders opportunity to bid under the new plans and specifications.

Thus, public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him, not included in or contemplated in the terms and specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement, and any contract entered into containing substantial provisions beneficial to the bidder which were not included in the specifications is void. Any other course would prevent real competition, lead to favoritism and fraud, and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications. A contract let upon the basis of anything else but the advertised plans and specifications would be one let without the competitive bidding which is necessary to give it validity."

From Section 80

"The law does not permit private negotiations with an individual bidder, nor any change of plans and specifications submitted for the competition,

nor variances for the purpose of obtaining a change in the bid of one or more bidders. The whole matter is to be conducted with as much fairness, certainty, publicity, and absolute impartiality as any proceeding requiring the exercise of quasi-judicial authority. Thus, if after advertising for and receiving sealed proposals for the doing of public work for a municipality, none of the bids is found satisfactory, the public body has no authority to favor one of the bidders by negotiations with him privately, changing the scope of the work to be done or the terms of payment therefor in consideration of the reduction of his offer. All persons desiring to bid upon the work and willing to comply with the terms prescribed must have equal opportunities to do so; and if the work is not awarded upon the first competition for any legitimate reason, it must be submitted to a second, with full opportunity as before for all persons desiring to participate to do so."

The resolution of CHA adopted May 12, 1967, required the disposition of all Renewal Project property "under open competitive conditions." At the Board meeting of CHA held July 11, 1969 (Ex. 11) the resolution authorizing the public offering of Cameron Hill specifically provided for "sale under open competitive conditions as set out in the public notice. . ." HUD's own guidelines by which CHA was bound required disposal of project land "in a fair and equitable manner" with procedures designed to assure "that they are open, in one way or another to public scrutiny." See HUD's Urban Renewal Handbook, Chapter 1, Section 1 (*RHM 7214.1*, set forth in paragraph 24I of the Complaint, 19A-20A). Said HUD guidelines further require (as there shown) that "each disposal of land . . . shall be at a price that is not less than the fair value of the

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land *for uses* in accordance with the Urban Renewal Plan."

The foregoing CHA resolutions and HUD guidelines complied with the statutory requirements. They were never cancelled or withdrawn. They were ignored when CHA conveyed to Cameron without prior public bidding in late 1973.

It was an abuse of discretion and arbitrary and capricious for CHA and HUD to allow the substantial changes in bid conditions to occur as here, without again submitting the matter for further public competition. As trustees for the public of this valuable land they abused fundamental trust law principles prohibiting favoritism and requiring reasonable effort to obtain the best price and best proposal. Any citizen such as petitioners who desired an *equal* opportunity to compete for the purchase and development of Cameron Hill has been effectively denied such opportunity under the circumstances of this case. Maximum opportunity to compete has not been given, as required by both state and federal law. Any such citizen has been specially injured in that he has been denied a fundamental right granted by Tennessee and federal law.

It was the obligation of Cameron to ascertain at its peril that CHA was acting within its authority when Cameron accepted the deed to Cameron Hill from CHA. 56 Am. Jur. 2d, "*Municipal Corporations*", §§ 504 and 554. When dealing with the public housing authority "plaintiffs were bound to know the limitation of its power." *Brown* v. *Mt. Vernon Housing Auth.*, (1952) 279 App. Div. 795, 109 N.Y.S. 2d 392. See also *Pittman Const. Co.* v. *Housing Authority of Opelousas*, (W.D. La. 1958) 167 F. Supp. 517.

Petitioners respectfully insist that the foregoing statutes, regulation, and resolution requiring that maximum opportunity be given to compete must be read in the light of the foregoing general law. It would be ridiculous to assume that Congress had any lesser standard in mind when it insisted on maximum opportunity as the overriding standard. It certainly did not revoke the general long-standing salutary rules governing bidding on public contracts, requiring equality of opportunity to all and preference to none. None of the defendants can point to any authority relieving HUD and CHA from complying with these basic bidding principles essential to the public welfare. Thus the District Judge was in error when he described the procedure followed merely as "most inappropriate" but legal (A11), instead of holding the award of the project and the deed to be illegal and void.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should accordingly issue to review the action of the U. S. Court of Appeals for the 6th Circuit approving the decision of the U. S. District Court for the Eastern District of Tennessee, Southern Division.

Respectfully submitted,

RICHARD P. JAHN
TANNER & JAHN
1223 Volunteer Building
Chattanooga, Tennessee 37402
Attorneys for Petitioners

March 3, 1976

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-74-41

DONALD L. WAMP; MARK K. WILSON, JR.; CARL L. GIBSON; SHERMAN L. PAUL; and MOCCASIN BEND ASSOCIATION, a Tennessee non-profit corporation,

Plaintiffs

-vs.-

CHATTANOOGA HOUSING AUTHORITY, a Tennessee corporation; CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CAMERON-OXFORD ASSOCIATES, an Indiana limited partnership; ADVANCE MORTGAGE CORPORATION, a Delaware corporation; MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., a Tennessee corporation; THE UNITED STATES OF AMERICA, ex rel the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also ex rel the FEDERAL HOUSING ADMINISTRATION,

Defendants

OPINION

(Filed September 19, 1974)

This is an action in which the plaintiffs seek to enjoin the construction of an apartment complex upon Cameron Hill, a local landmark within an urban re-

newal project in Chattanooga, Tennessee. The plaintiffs seek further to obtain a cancellation of the deeds and contracts between the developer and the government agencies in interest and to compel a re-evaluation, re-solicitation, and redisposition of the Cameron Hill tract. The lawsuit was filed in the state court and removed to this court. It is presently before this Court upon the following motions: (1) motions on behalf of the defendants, Chattanooga Housing Authority and the City of Chattanooga, to dismiss the complaint for lack of standing on the part of the plaintiffs to maintain the lawsuit (Court File #8 and #11); (2) motion on behalf of the plaintiffs for a preliminary injunction (Court File #17); (3) motion on behalf of the plaintiffs to amend their complaint so as to allege a cause of action for violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (Court File #18); and (4) motion on behalf of the defendant, Chattanooga Housing Authority, for summary judgment (Court File #29). An evidentiary hearing extending over portions of three days was held on the plaintiffs' motion for a temporary injunction and the case is now before the Court upon the record thus established.

A threshold question in this lawsuit is with reference to the removal jurisdiction of this Court, for, as noted, this lawsuit was filed in the state court and removed to this court. The defendants, the United States Department of Housing and Urban Development (HUD) and the Federal Housing Authority (FHA), petitioned for removal, averring federal agency removal jurisdiction under 28 U.S.C. § 1346(a)(2) and § 1441(a). The other defendants petitioned for removal averring federal question removal jurisdiction under 28 U.S.C. § 1331 and § 1441. The parties have raised no issue regarding removal jurisdiction but the defendants have

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each asserted a lack of standing upon the part of the plaintiffs to maintain the lawsuit. That assertion of necessity raises the issue of removal jurisdiction, for a finding of a lack of standing would prevent the existence of a "case or controversy," a prerequisite to federal court jurisdiction under Article III of the Federal Constitution. (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). In the absence of jurisdiction, no right of removal could exist.

In considering the issue of standing, further principles of removal law must be borne in mind. The first such principle is that the right of removal must have existed as of the time removal was attempted and the pleadings must be viewed accordingly. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 95 L. Ed. 702, 71 S. Ct. 534 (1951); *McLeod* v. *Cities Service Gas Co.*, 233 F. 2d 242 (10th Cir., 1956). Developments in the lawsuit or attempted amendments to the pleadings subsequent to removal cannot serve to confer federal court jurisdiction if none in fact existed as of the time of removal. Accordingly, the jurisdictional issue must be resolved before the Court can consider the plaintiffs' post-removal motion to amend their complaint or the plaintiffs' motion for a temporary injunction.

A second principle of removal law that must be borne in mind is that jurisdiction in the state court is also a prerequisite to removal of a lawsuit to the federal court, as federal court removal jurisdiction is to this extent derivative. In the absence of state court jurisdiction, a dismissal rather than a remand of the lawsuit is required. *Lambert Run Coal Co.* v. *Balti-*

more & O. R. Co., 258 U.S. 377, 66 L. Ed. 671, 42 S. Ct. 349 (1922); *Venner* v. *Michigan Central R. Co.*, 271 U.S. 127, 70 L. Ed. 868, 46 S. Ct. 444 (1926); *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 87 L. Ed. 1509, ... S. Ct. .... (1943). *See also* Moore's FEDERAL PRACTICE, Vol. 1A, § 0.164[2] note 41 and § 0.157[3].

It is appropriate, therefore, to look initially to the issue of jurisdiction in the state court prior to removal. It is also appropriate to note that the lack of standing of a party to maintain a lawsuit has been held to be jurisdictional in the Chancery Courts of Tennessee. In *Patton* v. *Chattanooga*, 108 Tenn. 197, wherein the issue was with regard to the standing of a taxpayer to maintain an action in chancery court against a municipality, the rule was stated thusly at page 227:

> "Thus examined, the Tennessee cases show that the court had *jurisdiction* to pass on questions, admittedly of a judicial nature, only when such *jurisdiction* is invoked 'by those having a special or peculiar interest in the question and there are none to the contrary'." (Emphasis supplied)

With regard to the interest of the plaintiffs in this lawsuit, the original complaint avers that each of the four individual plaintiffs "is a taxpayer to the City of Chattanooga, Tennessee and/or Hamilton County, Tennessee". The plaintiff, Moccasin Bend Association, is averred to be a non-profit corporation having as one of its primary concerns "the proper development of Cameron Hill and Moccasin Bend, prominent local historical landmarks". The complaint then proceeds to aver that some 15 years ago the Chattanooga Housing Authority acquired certain property in or adjacent to the downtown commercial area of Chatta-

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nooga in the course of an urban renewal project known as the "Golden Gateway Urban Renewal Project". Included within the property acquired was Cameron Hill, which in turn included a previously existing municipal park known as "Boynton Park". It is further averred that in December of 1973 the defendant, Chattanooga Housing Authority, effected a sale of the Cameron Hill tract to the defendant, Cameron-Oxford Associates, a limited partnership, upon the commitment of the latter to erect an apartment complex on the tract. Various irregularities are alleged on the part of the Chattanooga Housing Authority in planning for the use of the Cameron Hill tract and in effecting a sale of that tract, including (a) failure to permit adequate public participation in planning for the use of the tract, (b) failure to achieve the most beneficial use of the tract, (c) failure to re-establish an adequate replacement for Boynton Park, (d) failure to follow open competitive bidding in effecting a sale of the tract, (e) failure to obtain an adequate price for the tract, (f) failure to require disclosure of the true identity of the purchaser-developer, (g) improperly permitting delays on the part of the purchaser-developer in submitting a firm proposal and in initiating improvements, and (h) failure to give adequate public notice of the various activities hereinabove referred to. The co-defendants are alleged to have participated in one manner or another in the foregoing improper activities of the Chattanooga Housing Authority.

The defendants, both by motion and in their answers, deny standing upon the part of the plaintiffs to maintain this lawsuit.

In connection with the evidentiary hearing upon the plaintiffs' motion for a temporary injunction, the fol-

lowing facts having reference to the issue of standing were made to appear. The plaintiff, Donald Wamp, owns property within Chattanooga and is accordingly a taxpayer of that city. He is an architect by profession. His only interest in the subject matter of the lawsuit is derived from his status as a municipal taxpayer and a resident architect. The plaintiffs, Mark K. Wilson, Jr. and Carl Gibson, were not identified in the evidentiary hearing, their interest in the lawsuit having been described in the complaint as taxpayers of "Chattanooga and/or Hamilton County, Tennessee". The plaintiff, Sherman L. Paul, is a non-resident of Chattanooga, but is a resident of Hamilton County, residing on Signal Mountain, Tennessee. He is a former county tax assessor and is President of the Moccasin Bend Association. His interest in the lawsuit is derived from his status as a taxpayer of Hamilton County and his position as President of the Moccasin Bend Association. The plaintiff, the Moccasin Bend Association, is a non-profit corporation having as one of its purposes the preservation and enhancement of historic and scenic landmarks in the Chattanooga Area, including Cameron Hill. The re-establishment of Boynton Park on Cameron Hill in a manner deemed adequate is an area of particular interest to the association and its members.

Suffice it to say in summary, the interest of each individual plaintiff is that of a civic minded taxpayer of the city or county wherein Cameron Hill is located. The interest of the corporate plaintiff is that of an association concerned with the preservation of local scenic and historic landmarks. Neither plaintiff asserts any ownership in Cameron Hill or any economic or financial interest in its disposition other than as taxpayers or, in the case of Moccasin Bend Association,

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as a civic improvement organization. Nor do they claim any special injury to themselves, different from that which might be asserted by any civic minded taxpayer or by any association concerned with the preservation and enhancement of local areas having scenic and historic attributes.

The rule in Tennessee is well established that citizens and taxpayers are without standing to maintain a lawsuit to restrain or direct governmental action unless they first allege and establish that they will suffer some special injury not common to citizens and taxpayers generally. *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901). The reasons for the rule, as given in the *Patton* case, were variously stated to be that "Courts do not sit to declare abstract propositions of law" and that, "in matters common to all citizens, the law confers upon the duly elected representatives of the people the sole right to appeal to the courts for redress" and that "if the cities could not exercise public powers, even erroneously or unwisely, when lawfully done by their constituted legislative authority, without the concurrence of every citizen or taxpayer, it would be impossible to have municipal governments. . ." In the rather recent case of *Badgett* v. *Rogers*, 222 Tenn. 374, 436 S.W.2d 292 (1968), the Tennessee Supreme Court stated the rule to be as follows:

> "As a general rule of long standing in Tennessee, individual citizens and taxpayers may not interfere with, restrain or direct official acts, when such citizens fail to allege and prove damages or injuries to themselves different in character or kind from those sustained by the public at large."

The plaintiffs contend, however, that the allegations and facts in the present case bring them within an exception to the general rule, that exception being that a taxpayer may sue without averring or establishing any special injury where an illegal use of public funds is involved. The exception relied upon by the plaintiffs is stated as follows in *Badgett* v. *Rogers*, *supra*, 456 S.W.2d 292 at 294:

> "However the courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes."

Having thus stated the exception, it should be noted that the Court in the *Badgett* case nevertheless disallowed an action wherein a taxpayer sought to attack the legality of an expense allotment to a mayor, the expense allotment being in addition to his salary. The disallowance was predicated upon the conclusion that the taxpayer had made insufficient allegations of fact regarding the illegality of the expense allotment.

Under the allegations of the complaint, as well as under the facts as hereinabove found by the Court, it would appear that the plaintiffs were without standing to maintain this lawsuit in the Chancery Court of the State of Tennessee wherein it was originally filed. There is no contention made or evidence submitted that the plaintiffs, by reason of the matters complained of, have sustained any special injury or any injury other than that common to all civic minded taxpayers. In fact, the plaintiff, Moccasin Bend Association, does not even assert the status of a taxpayer. With regard to the contention of the individual plaintiff-taxpayers that they come within the exception announced in

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Badgett v. *Rogers, supra,* affording standing to a taxpayer to litigate an alleged misuse of public funds, there are two difficulties. The first is that the exception stated in the *Badgett* case refers only to the misuse of public funds, not to the misuse of public property. The present case involves the alleged mismanagement of property in an urban renewal project. Each case cited in the *Badgett* case in support of the exception therein stated pertains to the levying of an unlawful tax or the unlawful expenditure of public funds. The plaintiffs have cited no Tennessee case and the Court has been unable to find one wherein the courts of Tennessee have allowed a taxpayer claiming no special injury to maintain a suit for mismanagement of public property.

In the second place, while the complaint avers many irregularities upon the part of the Chattanooga Housing Authority in the disposition of the Cameron Hill tract and the evidence reflects that a number of unusual, if not questionable, practices were followed by that agency in the negotiation and awarding of a contract disposing of the Cameron Hill tract, the Court, with but one possible exception, is unable to find any specific instance of illegal conduct on the part of the Chattanooga Housing Authority or any other defendant with regard to that disposition. Rather, each action appears to have been within the legislative or administrative authority or discretion of the various agencies and defendants involved.

The only statutory provisions cited to the Court and contended to have been violated under the allegations of the complaint as filed in the state court were the provisions of section 1455(a)(ii) of Title 42 U.S.C. and T.C.A. § 13-821, wherein the agencies responsible

for urban renewal projects were required to "afford maximum opportunity" to private enterprise to effect redevelopment, and the provisions of section 1455(e)(1) of Title 42 U.S.C. wherein the local agency in charge of an urban renewal project is required, as a condition precedent to the awarding of a contract, to make public disclosure of "the name of the redeveloper . . . its officers and principal members, shareholders and investors, and other interested parties". There is no evidence of a violation of section 1455(a)(ii) or T.C.A. § 13-821. The Chattanooga Housing Authority does appear to have entered into a contract with a developer, Cameron-Oxford Associates, a limited partnership listing a trustee as the limited partner having a 95% partnership interest, but without making or requiring any public disclosure of equitable owners or beneficiaries of the trust. Whether this omission would constitute a sufficiently substantial failure on the part of the Chattanooga Housing Authority to constitute a statutory violation or whether such a violation would render any contract thereafter entered into void or voidable at the instance of the Chattanooga Housing Authority, the H.U.D., the F.H.A., or the United States attorney acting under his general authority, the Court does not here decide. Suffice it to say that such illegality, if in fact it be an illegality, affords no standing under Tennessee law to a taxpayer suffering no special injury therefrom to litigate the issue.

With regard to agency guidelines, a Chattanooga Housing Authority guideline alleged to have been violated was one providing that urban renewal tracts should be disposed of "under open competitive conditions". The evidence is undisputed that Chattanooga Housing Authority did solicit bids under "open competitive conditions", but, receiving only one bid, there-

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upon proceeded to engage in extensive, prolonged and private negotiations with the bidder, its successors and assigns, for the disposition of the Cameron Hill tract. Such action on the part of a public agency dealing with public property was, in the Court's opinion, most inappropriate. It does not appear to have been in violation of any law.

Another agency guideline alleged to have been violated was the requirement that urban renewal tracts be disposed of for "fair value" and "in a fair and equitable manner". H.U.D. having approved the sale here under attack, both the generality of the guidelines and the nature of the evidence provide no basis for the substitution of judicial discretion in lieu of agency discretion as to whether the disposition was effected in a "fair and equitable manner" or as to what may have been a "fair value" for the property under the limitations and conditions of the sale.

It is the further insistence of the plaintiffs that the defendants, and in particular the Chattanooga Housing Authority, acted illegally in failing to re-establish a park of adequate size and appropriate location on Cameron Hill to replace the former Boynton Park. The plaintiffs' contention in this regard appears to be that the title of Chattanooga Housing Authority to the Cameron Hill tract was impressed with a trust to this effect. The evidence fails to reflect, however, that the Chattanooga Housing Authority held title to the Cameron Hill tract subject to any such equitable encumbrance or duty. Rather, it appears that the Chattanooga Housing Authority acquired clear title to the entire Cameron Hill tract some 15 years ago, including the former municipal park located thereon. Cameron Hill has remained undeveloped and unused since its acquisition by the Chattanooga Housing Authority. In fact, some 10

or 12 years ago the entire top portion of the hill was removed to acquire fill material for a highway project. At that time litigation was initiated by citizens and taxpayers against the Chattanooga Housing Authority in an effort to prevent the dispoilation of the hill and to preserve the Boynton Park area. The litigation resulted in an adjudication by the Tennessee Supreme Court that "the bill fails to show any proposed illegal action of the Housing Authority" and "these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga". *See Mrs. Sim Perry Long, et al.* v. *Chattanooga Housing Authority, et al.* (unpublished opinion entered November 9, 1962).

The Court is of the opinion that no genuine issue of fact exists but that the plaintiffs were without standing to maintain this lawsuit in the Chancery Court of Hamilton County, Tennessee, wherein it was originally filed and wherein it was pending at the time of removal to this court. The plaintiffs being without standing to maintain the lawsuit, the Tennessee Chancery Court was without jurisdiction to entertain the lawsuit. The state court being without jurisdiction, this Court is, by derivation, likewise without jurisdiction. The lawsuit must accordingly be dismissed.

In view of the conclusion herein reached, it becomes unnecessary and inappropriate to consider the further contentions and motions in the case, including the contentions of the parties with regard to the plaintiffs' standing or lack of standing under the federal law, and including the plaintiffs' motions to amend their complaint and for a temporary injunction.

An order will enter dismissing this lawsuit for lack of jurisdiction.

/s/ Frank W. Wilson
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

CIV-1-74-41

DONALD L. WAMP; MARK K. WILSON, JR.; CARL L. GIBSON; SHERMAN L. PAUL; and MOCCASIN BEND ASSOCIATION, a Tennessee non-profit corporation,

Plaintiffs

-vs.-

CHATTANOOGA HOUSING AUTHORITY, a Tennessee corporation; CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CAMERON-OXFORD ASSOCIATES, an Indiana limited partnership; ADVANCE MORTGAGE CORPORATION, a Delaware corporation; MILLIGAN-REYNOLDS GUARANTY TITLE AGENCY, INC., a Tennessee corporation; THE UNITED STATES OF AMERICA, ex rel the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and also ex rel the FEDERAL HOUSING ADMINISTRATION,

Defendants

JUDGMENT OF DISMISSAL

(Filed September 19, 1974)

This is an action in which the plaintiffs seek injunctive relief with reference to a tract of land within an urban renewal project. The case is presently before the Court upon various motions, including motions by

the defendants for summary judgment. For the reasons set forth in an opinion filed herein, it is the judgment of the Court that the case should be dismissed for lack of jurisdiction.

It is accordingly ORDERED that the defendants' motion for summary judgment be sustained and that the lawsuit be and the same is hereby dismissed for lack of jurisdiction.

APPROVED FOR ENTRY.

/s/ Frank W. Wilson
United States District Judge

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No. 75-1192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD L. WAMP, ET AL.,
Plaintiffs-Appellants,

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 5, 1975.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PER CURIAM. This action was filed to enjoin the construction of an apartment complex on Cameron Hill, a local landmark in Chattanooga, Tennessee, where municipally owned Boynton Park formerly was located. The suit was initiated in the State Chancery Court and was removed by the defendant to the United States District Court.

In an opinion published at 384 F.Supp. 251 (E.D. Tenn. 1974), Chief District Judge Frank W. Wilson held that the plaintiffs did not have standing under Tennessee law to maintain the suit in Tennessee Chan-

cery Court and that the District Court therefore had no removal jurisdiction. Accordingly, the action was dismissed. Plaintiffs appeal. Reference is made to the reported decision of the District Court for a recitation of the pertinent facts.

Appellants contend that the District Court incorrectly construed the relevant Tennessee decisions and, therefore, they have standing to sue under Tennessee state law. We hold that the District Court correctly construed and applied the controlling decisions of the Supreme Court of Tennessee. *Sachs* v. *County Election Commission*, 525 S.W.2d 672, 673 (Tenn. 1975); *Bennett* v. *Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975); *Badgett* v. *Rogers*, 436 S.W.2d 292, 294 (Tenn. 1968); *Patton* v. *City of Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901).

The Supreme Court of Tennessee ruled to the same effect in its decision in another case involving the Cameron Hill area in Chattanooga. In an action filed in Chancery Court, a group of interested citizens and taxpayers sought to enjoin the Chattanooga Housing Authority and the City of Chattanooga from altering or changing the natural contours or topography of Boynton Park and abolishing it as a public park. In an unpublished decision announced November 9, 1962, the Supreme Court of Tennessee said:

> Second, these complainants are entitled to no rights in Boynton Park other than those common to all citizens of Chattanooga.
>
> Tennessee decisions holding as above stated are legion. It is said that the leading case is Patton v. Chattanooga, 108 Tenn. 197.

It is further asserted by appellants that, even if the District Court was correct in its interpretation of

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Tennessee law, they have standing as a matter of federal law. We agree with the District Court that if appellants had no standing to maintain the action in the State court, the District Court had no removal jurisdiction.[1]

In *Lambert Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922), the Supreme Court, speaking through Mr. Justice Brandeis, said:

> The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

Lambert was followed and applied in this court in *Bancohio* v. *Fox*, 516 F.2d 29 (6th Cir. 1975), in which numerous other decisions are cited to the same effect. *See also Friedr. Zoellner Corp.* v. *Tex. Metals Co.*, 396 F.2d 300, 301 (2d Cir. 1968).

The decision of the District Court is affirmed. Costs on this appeal are taxed against appellants.

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1. Even if federal standing decisions were applicable, appellants would be met by the decisions of this court in *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir. 1973), cert. denied, 414 U.S. 1068 (1973); and *South Hill Neighborhood Association* v. *Romney*, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1192

DONALD L. WAMP, ET AL.,
Plaintiffs-Appellants,

v.

CHATTANOOGA HOUSING AUTHORITY, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

(Filed December 5, 1975)

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal,

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as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk